

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE WALKERTON COMPENSATION PLAN**

E(minor)

Applicant

AND:

The Court Appointed Administrator

Respondent

Submissions:

On behalf of the Applicant: Michelle T. Beckow, Applicant counsel

On behalf of the Administrator: Milena Protich, Plan counsel

COURT APPOINTED ARBITRATOR:

Reva Devins

REPORT

1. Ms. SE has submitted an application on behalf of her minor daughter, E, (the “Applicant”), for compensation under the Walkerton Compensation Plan.
2. The Applicant was born on September *, 2000 and claimed compensation for illness arising from contaminated water. She was not a resident of Walkerton; however, her mother had consumed water in Walkerton and had become ill in May 2000. The Administrator determined that E did not meet the criteria for Class Membership and has not made an Offer of Compensation for illness.
3. The sole issue to be arbitrated is whether E qualifies as a Class Member. On consent, this matter proceeded by way of written submissions.

The Plan

4. The Overview to the Walkerton Compensation Plan provides, in part, as follows:
The Government of Ontario is committed to providing financial support and compensation to any individual who became sick or lost loved ones or otherwise incurred certain out-of-pocket expenses or losses, because of contaminated water in Walkerton. ...

The purpose of this Walkerton Compensation Plan is to pay to the Applicants full and complete compensation, without regard to fault, in accordance with Ontario law and with the terms and conditions herein, provided, however that no amount shall be paid for aggravated, exemplary or punitive damages.

Individuals will have access to fair compensation through an efficient, timely, and impartial process. Applications will be individually evaluated and, if necessary, resolved through a mediation process, and where unsuccessful, independent arbitration.

5. Under the terms of the Walkerton Compensation Plan, non residents of Walkerton are admitted as Class Members if they fall within one of the definitions below:
 - a. Section 1(b) includes “all persons, except the defendants and third parties, who were not ordinarily resident in Walkerton, who consumed or used water delivered by the Walkerton PUC at any time in the period April 1, 2000 to June 27, 2000 and who became ill or died as a result thereof.”;
 - b. Section 1(c) includes “all persons, except the defendants and third parties, who were infected with gastroenteritis or a similar illness by exposure to a person described in 1 (a) or (b) above.”; and
 - c. Section 1(d) includes “Any and all persons, except the defendants or third parties, who are not described in (a), (b) and (c) above or in the definition of a Family Class Member, who has suffered a loss of any nature or kind relating to or arising directly or indirectly from the contamination of the water delivered by the Walkerton PUC in the period from April 1, 2000 to December 5, 2000.
6. In accordance with section 3.2.2 of the Plan, the Administrator will only offer compensation when it is satisfied, on a balance of probabilities, that:
 - a. The Applicant is an eligible person under the Plan;
 - b. The physical injury or loss was caused by the contamination of Walkerton’s water supply between April 1 and December 5, 2000;
 - c. The damages claimed were suffered; and
 - d. The damages are payable in accordance with Ontario law.

Facts

7. The Applicant’s mother was not a resident of Walkerton, however, the Administrator has accepted that she consumed contaminated water in May 2000 and was ill during the second trimester of her pregnancy. The symptoms of her illness were relatively modest and were described as “diarrhea and mild cramping, lasting approx. one week”¹.

¹ Stage 1 Application for Compensation, page 3.

8. E was born on September *, 2000 and was breastfed as an infant. In her Stage 1 Application, her mother described E as suffering from diarrhea for approximately six months from the time of her birth. She also stated that E had suffered two bouts of pneumonia.
9. The Applicant's grandmother submitted a letter dated October 20, 2005 further describing E's illness as "severe diarrhea from the time she was born to more than six months of age. ... Also due to her diarrhea, her immune system was broken down, causing her to come down with frequent colds, tonsillitis, lung infections, wheezing, barking coughs, sore throat, bronchitis and pneumonia. ... It repeatedly became necessary to take her to the hospital and often to Doctors on Call (Clinics) in the evenings. ... She suffered from vagina discharge, high fevers, sporadic vomiting and ongoing abdominal pains."
10. In the Health Practitioner's Information Form prepared on January 25, 2002 by the Applicant's physician, Dr. **** indicates that E was not ill because of the consumption of water delivered by the Walkerton P.U.C. between April 1, 2000 and December 5, 2000. He further states that the Applicant was not ill because of exposure to someone else who became ill due to consumption of contaminated water. Dr. **** notes that E visited her grandparents in Walkerton over Christmas 2000 and that she developed a respiratory infection at that time. He concludes, however, that he could find no connection between that illness and the Walkerton water contamination.
11. The Applicant did submit other medical records which recorded a number of medical visits. These records disclosed respiratory complaints in November 2000, March and April 2001. She was diagnosed with pneumonia in April 2001 and experienced some vomiting at this time. Hospital records dated September 5, 2000 indicate that E mom was concerned about her suffering from gas and that E buttocks were red.
12. E's family also participated in the WEL study and her parents' concerns regarding E's health were set out in the Year 1 survey. Specifically, it was reported that E suffered regular abdominal pain, constipation, diarrhea, fever and increased urination. After seeing the family, Dr. **** wrote to E's family physician advising that she had referred the family to a community pediatrician. Dr. **** identified a number of medical issues including E's developmental delay and poor nutrition and the many social stressors that the family was experiencing. Dr. **** did not express any opinion regarding a connection to the consumption of contaminated water or infection from exposure to another person who was infected by the Walkerton water supply.
13. The Applicant did not submit any other medical evidence to support her claim for compensation. She did not submit a medical opinion that she suffered an illness as a result of exposure to contaminated water delivered by the Walkerton P.U.C. and she acknowledged that neither party had provided an expert opinion with regard

to whether her illness could be attributed to exposure to contaminants while being breastfed.

14. The Administrator introduced expurgated copies of expert reports produced in connection with other claims for compensation. Applicant's counsel did not take issue with the general conclusion reached by Dr. ****, which can be summarized as follows:
 - a. A breastfed infant could only be infected by the water borne pathogens that caused the outbreak of diarrhea in Walkerton if the child actually ingested the bacteria. The contaminant could be ingested either directly, for example if the baby bathed in contaminated water or put an object in their mouth that had previously been washed in contaminated water. Or, the child could be infected indirectly, by exposure to bacteria excreted by another infected person. For example, when bacteria is excreted in the infected person's stool it can be transferred to objects that the child might ingest if the infected individual does not thoroughly wash their hands.
 - b. E. coli 0157:H7 and Campylobacter, the main contaminants found in the Walkerton water, cause symptoms within ten days of ingestion.
 - c. These bacteria cause symptoms at the time of infection and do not persist or colonize in the intestine for long periods of time, suddenly causing symptoms or disease at a later date.

Submissions

15. Applicant's counsel submitted that E suffered from two bouts of pneumonia and constant diarrhea and cramps from the time of her birth, September *, 2000, to approximately February 1, 2001. In the Applicant's submission, E had a normal delivery, appeared healthy upon her birth and but for being breastfed by a mother who was exposed to contaminants during the relevant time, she would not have experienced these symptoms of illness.
16. The Applicant takes the position that the family's concerns regarding E's health were well documented from the time of her birth, as was her mother's exposure to Walkerton water while she was pregnant. It was further submitted that the expert opinion provided by Dr. **** did not assist in determining the central issue of whether E became ill due to exposure while being breast fed. In final written submissions, the Applicant submitted that she was prepared to seek an expert opinion from Dr. **** on this issue, if required by the Arbitrator.
17. Plan Counsel submitted that the Applicant bears the burden of proving, on a balance of probabilities, that she meets a definition of Class Member within the Plan Settlement Agreement. It was further submitted, that the Applicant had failed

to meet this burden and had not established on a balance of probabilities that she was ill as a result of exposure to contaminated water, either by use or consumption of contaminated water or by exposure to a person who had become ill after consuming contaminated water.

18. Plan Counsel argued that there was no medical evidence to support the Applicant's position and no expert opinion that the Applicant could have been exposed to contaminants in the manner that she suggests. Moreover, it was submitted that the Applicant's position was inconsistent with the expert evidence of Dr. ****. Lastly, Plan Counsel took issue with the evidence of E's grandmother as it was submitted very late in the proceedings and was not subjected to cross examination. Even if accepted, it was submitted that this evidence should be given little weight as it conflicts with the medical evidence that has been submitted.

Decision on Compensation

19. The Walkerton Compensation Plan was intended to be a simple, expeditious means to obtain compensation for those who have suffered a loss as a result of the contamination of Walkerton's water supply. Once admitted as Class Members, claimants are entitled to receive full and complete compensation, in accordance with Ontario law, for losses sustained because of contaminated water in Walkerton. The Administrator is obliged to assess individual claims and to offer compensation to address the losses of those who suffered through the Walkerton water emergency.
20. The Plan is designed as a compensation scheme without the trappings of the traditional adversarial model. The administration of the Plan should not rely on unduly technical or onerous requirements to establish eligibility. Nonetheless, there are minimum criteria that must be met when monetary compensation is being sought. Entitlement is defined in the Plan approved by the Court and requires that the loss or injury claimed arises, directly or indirectly, from the contamination of the water delivered by the Walkerton PUC².
21. I agree with the submissions of Plan Counsel that the Applicant has the burden of proving, on a balance of probabilities, that she became ill or suffered a loss as a consequence of exposure to a person infected by water borne pathogens. In this case, the Applicant seeks to establish class membership under section 1(c) or 1(d), and E must therefore demonstrate that:
 - a. She was "infected with gastroenteritis or a similar illness" and
 - b. Her illness was "by exposure to a person" who "consumed or used water delivered by the Walkerton PUC ... in the period April 1, 2000 to June 27, 2000"; or
 - c. She suffered a loss that relates to or arises directly or indirectly from the contamination of the water delivered by the Walkerton PUC in the relevant period.

² Definition of Class Member as set out in Schedule A of the Walkerton Compensation Plan.

22. There is some evidence that E was ill for several months after her birth. Her medical records confirm several complaints related to respiratory symptoms, and there is some, although very limited, reference to gastrointestinal complaints. There is a hospital record dated September 5, 2000, a few days after her birth, that notes that E was suffering from gas and sore buttocks. As well, on attending at the WEL follow up clinic in Walkerton on December 5, 2002, E's parents described E as having experienced regular abdominal pain, constipation, diarrhea, fever and increased urination.
23. The most detailed evidence that E suffered symptoms of gastrointestinal illness comes from her mother and grandmother. In considering this evidence, I prefer E's mother's evidence, as her primary caregiver, to that of her grandmother. Her mother described E as having suffered from diarrhea for the first six months of her life; however, there is virtually no reference to these symptoms in the medical records that correspond to this time period. While I accept the family's evidence as having some anecdotal value, I give it very limited weight as an aid to determining the severity of E's condition. This evidence has not been tested on cross examination and is not supported by the independent medical evidence.
24. I find that the Applicant suffered a number of illnesses after her birth, predominantly of a respiratory nature with some limited gastrointestinal concerns. On the evidence before me, however, I do not find that these symptoms, illnesses or conditions were connected to the consumption of contaminated water or due to exposure to another person who was ill due to consumption of Walkerton water.
25. The Applicant in this case was born more than three months after the boil water advisory was issued and there is no evidence to suggest that she directly consumed contaminated water. The Applicant claims that "she became ill through being breast fed by her mother who was ill as a result of the use or consumption of contaminated water".
26. There is no issue that the Applicant's mother was ill with diarrhea for several days in May 2000 while pregnant with E. There is also no issue, for the purposes of this Arbitration, that the Applicant's mother was ill as a result of consumption of contaminated water in Walkerton. Counsel for the Applicant has not argued that E was infected *in utero*. Indeed there is no evidence to support a finding that her mother's mild case of gastroenteritis while pregnant had any impact on E's development before her birth.
27. Rather, the Applicant's case rests on the suggestion that she became infected while being breastfed a number of months after her mother was infected and after her mother had ceased experiencing any symptoms of illness. Despite the Applicant's contention, none of her health care providers have said that there is any connection between her illnesses and exposure to Walkerton water

contaminants. Nor is there an expert opinion that supports the position advanced by the Applicant.

28. E's treating physicians did not find a connection between any of her symptoms and exposure to contaminated water from Walkerton. Dr. **** submitted a Health Practitioners Health Form on behalf of the Applicant and specifically stated that she was *not* ill because of the consumption or use of contaminated water or because she was exposed to someone who was ill due to the consumption of contaminated water. Dr. ****, who examined E at a clinic designed to follow up on patients post infection due to the Walkerton water crisis, made no findings regarding illness related to exposure to water borne pathogens and alternatively identifies her concern regarding developmental delay, poor nutrition and dependence on baby bottles
29. With respect to the expert evidence that was available, it confirms that a breast fed infant would become ill if she actually ingested the pathogens that were present in the Walkerton water system. The method of ingestion could be direct, through contact with the water, or indirect by exposure to bacteria excreted by another infected person. Dr. **** further provided his expert opinion that the bacteria would cause symptoms at the time of infection and would not persist in the intestine and suddenly cause disease at a much later date.
30. In my view the expert evidence is inconsistent with the theory of infection advanced by the Applicant. Although Dr. ****'s evidence was originally sought in relation to a different claim, the Applicant in this case has not adduced any contrary evidence to establish that the bacteria that infected E's mom in May 2000 could have been transmitted to E several months after her mother had fully recovered from her symptoms. Nor is there any other evidence to support a causal connection between E's symptoms after her birth in September 2000 and her mother's brief illness in May 2000.
31. In large measure, the Applicant's case rests on the absence of evidence to displace the *possibility* that E was ill as a result of her mother's exposure to contaminants before she was born. Although I understand the concern of E's parents, this application raises little more than their fears without the corresponding evidence to support their conclusion. Speculation or mere possibility is not, in and of itself, a sufficient basis for inclusion as a Class Member.
32. Counsel for the claimant acknowledged that "neither party" has provided expert evidence to support her position. Counsel did state that the Applicant was "prepared to request an expert opinion from Dr. ****" if required by the Arbitrator. In light of the total absence of medical evidence to suggest that the Applicant was ill due to contaminated water, this is not a case, in my view, where clarification of Dr. ****'s existing opinion is necessary to understand the

evidence that has been provided. There was simply no hint or suggestion anywhere in the medical evidence or opinions provided to recommend this as a fruitful avenue that should be pursued. Although I appreciate that E's parents fear that she was ill because her mom had been ill, this is not a view shared by any of E's health care providers. In these circumstances, I do not believe that it would be appropriate for me to order that an opinion be sought on the theoretical possibility advanced by the claimant.

Order

33. The Applicant, E has not established that she that she became ill or suffered a loss as a consequence of exposure to a person infected by water borne pathogens or that she suffered a loss relating to or arising directly or indirectly from Walkerton's contaminated water supply. Therefore, the Applicant does not qualify as a Class Member under the Walkerton Settlement Plan.

Dated February 20, 2006

Reva Devins,
Court Appointed Arbitrator/Referee